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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 349.

WALTER P. GARDNER, Trustee of The Central Railroad Company of New Jersey,
A Debtor-Petitioner,

vs.

THE STATE OF NEW JERSEY,
A Creditor.

BRIEF OF CITY OF JERSEY CITY, *AMICUS CURIAE*, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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BRIEF OF CITY OF JERSEY CITY, *AMICUS CURIAE*, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Status of *Amicus Curiae*.

The City of Jersey City files this brief as *amicus curiae*, since it has an interest of approximately 30% as statutory distributee in the tax claim of the State of New Jersey against the debtor and trustee.

Statement of the Case.

A statement of a substantial portion of the facts material to this application is to be found in *Gardner* v. *New Jersey*, 329 U. S. 565, at pages 568-572, 584.

In summary, the situation is as follows:

The State of New Jersey asserts a claim of lien against the estate of the debtor for delinquent taxes and statutory interest accrued thereon for the tax years 1932 to 1940, inclusive, subject to credits of certain payments which have been made during the reorganization proceedings. The trustee and the bondholders of the debtor have filed a number of objections to the claim of the state, both in respect of the total amount involved and as to the priority and existence of the lien as to the statutory interest part of the claim. Of these objections, one, that based upon the effect of the enactment by the New Jersey legislature of the "Railroad Tax Settlement Acts" of 1941-1942 (Chap. 290 of the Laws of 1941, and Chap. 241 of the Laws of 1942), and events subsequent thereto, would make it unnecessary, if sustained, to consider any of the others. The latter objections to the taxes and the assertion of lien are based partly upon the United States Constitution and partly upon the Bankruptcy Act. Those that relate to the Constiution will be detailed hereinafter.

The Railroad Tax Settlement Acts had the purported effect of permitting the payment of accrued principal tax arrears of various railroads, including the debtor, in installments over a period of years, and of abating in entirety statutory interest. The trustees of the debtor attempted to comply with the Settlement Acts, but an action instituted in the Court of Chancery by the New Jersey Attorney General and his refusal to approve the settlement papers prevented any of the necessary state officials from accepting the tenders of payments and documents made by the trustees, and such litigation finally eventuated in an adjudica-

tion by the New Jersey Court of Chancery, affirmed by the New Jersey Court of Errors and Appeals, that the Settlement Acts were null and void as in contravention of the New Jersey Constitution, and enjoining the effectuation thereof by any New Jersey official. *Wilentz* v. *Hendrickson,* 133 N. J. Eq. 447, 33 Atl. (2d) 366; affirmed 135 N. J. Eq. 244, 38 Atl. (2d) 199.

Subsequently, the trustees and the bondholders formally restated the basis of their objections to the New Jersey claim, first, in a petition of the trustees requesting an adjudication concerning the claim (p. 47a), and then in Supplemental and Amended Objections and Defenses to the Claim (pp. 94a; 586a). The Supplemental and Amended Objections and Defenses are first, that the claim "exceeds" by a stated figure "the maximum amount which the State of New Jersey may lawfully claim to be due under or by virtue of its statutes, viz., Chap. 290 of the Laws of 1941, and Chap. 241 of the Laws of 1942, with which Statutes the undersigned Trustees of the Debtor have duly complied pursuant to the orders of this Bankruptcy Court" (p. 94a, par. 1; p. 586a, par. 1), and "Alternatively" (p. 95a, par. 5; p. 586a, par. 2), that if the first objection, that based upon the Settlement Acts, is denied, the claims and the lien asserted are objectionable on the basis of various federal constitutional and federal bankruptcy statutory provisions.

The present application is for a review of a judgment of the Circuit Court of Appeals reversing Order No. 260 of the Bankruptcy Court which denied an application of the Attorney General of New Jersey for permission to submit to the courts of New Jersey for adjudication the state law and state constitutional questions involved in the major

defense of the trustees and bondholders to the tax claim, that based upon the effects and consequences of the enactment of the Railroad Tax Settlement Acts. The questions sought to be referred to the state courts were framed by the Attorney General in his petition (p. 135a; par. 1 on p. 136a), in the language of the prayer of the petition of the trustees to the Bankruptcy Court for adjudication concerning the claims (p. 71a, prayers No. 1 and 2), *i. e.*, whether the trustees had entered into a contract with the State of New Jersey (pursuant to the Settlement Acts), and whether such contract is binding on the parties thereto. The Bankruptcy Court denied the Attorney General's petition, holding that the determination of these questions should remain with the Bankruptcy Court (p. 217a), and the Circuit Court of Appeals reversed (Tr., p. 50), holding that the stated questions should be determined in the state courts. The opinion of the Circuit Court describes the issue to be referred to the state courts thus: "The basic problem of whether there is a contract between the debtor and the State of New Jersey" (Tr., p. 42).

ARGUMENT.

I.

Certiorari should be denied because the action directed by the Circuit Court of Appeals is that required by recent applicable decisions of this Court.

We submit that regardless of the reasoning in the opinion of the Circuit Court of Appeals by which it reached the

result of reversal, the judgment was one which this Court would concur in on the basis of its own recent applicable rulings, and that therefore certiorari should be denied as accomplishing no useful purpose, but only such further delay as this reorganization can ill afford. The rules which required the result directed by the judgment below are these:

(a) Where a federal court is confronted with uncertain questions both of state law and of federal constitutional law, and the latter may be obviated by an authoritative state court determination of the local law questions, the federal court will refer the latter to the state courts for determination. *American Federation of Labor* v. *Watson*, 327 U. S. 582; *Spector Motor Service, Inc.* v. *McLaughlin*, 323 U. S. 101; *Chicago* v. *Fieldcrest Dairies*, 316 U. S. 168; *Railroad Commission of Texas* v. *Pullman Co.*, 312 U. S. 496; and see *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450, 470.

(b) The federal courts should refer state law questions to the state courts for determination wherever such a factual situation exists as makes that course conduce to "the appropriate relationship between federal and state authorities functioning as a harmonious whole." *Chicago* v. *Fieldcrest Dairies, supra* (316 U. S. at p. 173); *Railroad Commission* v. *Pullman Co., supra*, (312 U. S. at pp. 500, 501); *Thompson* v. *Magnolia Petroleum Co.*, 309 U. S. 478.

The application of each of these rules to the situation involved below is plain.

1. As to the potential elimination of federal constitutional questions:

As we have indicated above, the trustee and the bondholders rely in objection to the asserted tax liens primarily upon the Tax Settlement Acts. If it is held that they are entitled to the benefit of these acts, the claim of the state is either eliminated or very substantially reduced. The trustee and all of the bondholders have expressed unqualified acceptance of the Tax Settlement Acts. If they are held applicable, the trustee and the bondholders have expressed complete willingness to make payment from the estate of the debtor to New Jersey of whatever is required thereby, and every single alternative objection based either upon the federal constitution or the bankruptcy law is eliminated from the case. The subsidiary questions of state law within the general question as to the existence of a binding contract between the debtor and trustee, and New Jersey, which the Attorney General will submit to the state courts pursuant to his application now ordered granted by the Circuit Court of Appeals, are these:

(a) Are the Tax Settlement Acts offensive to the New Jersey Constitution in their application to the debtor? (This will involve testing the acts, not only by Article I, Section 20, of the New Jersey Constitution, which they were held to violate in *Wilentz* v. *Hendrickson, supra,* but also by Article IV, Section 7, Paragraph 11, prohibiting special laws granting privileges and immunities, a question which was raised by the Attorney General in *Wilentz* v. *Hendrckson,* but found unnecessary for determination by the court in that case. See 133 N. J. Eq. 447, 463. This latter constitutional deficiency of the Tax Settlement Acts is

also asserted by the Attorney General in the present proceeding (p. 108a, pars. 12, 13).

(b) Assuming the acts do contravene either or both of the New Jersey constitutional provisions referred to, does the attempted compliance by the trustee with said acts prior to the declaration of their unconstitutionality by the New Jersey courts, have the effect, under New Jersey law, of binding the state by contract under said acts?

While we have no doubt but that the latter issue would be determined against the trustee on the basis of such New Jersey cases as *Hyman* v. *Long Branch Kennel Club, Inc.*, 115 N. J. L. 123 and *Eastwood* v. *Russell*, 81 N. J. L. 672, the trustee supports his position as to that issue by reliance upon such cases as *Lang* v. *Bayonne*, 74 N. J. L. 455, 459. This Court, in *Gardner* v. *New Jersey, supra*, referred to both of the foregoing issues as "questions of local law" involved herein (329 U. S. at p. 583). If *either* of the foregoing local law questions are determined by the state courts in favor of the trustee, the following seriously asserted *questions of federal constitutional law*, formally raised by the trustee and bondholders as alternative objections to the state's tax and lien claims, *are rendered entirely unnecessary of determination:*

(1) The New Jersey assessments were discriminatory in that they were at or in excess of true value, while non-railroad property was assessed at less than true value or exempted, thereby violating the equal protection clause of the Fourteenth Amendment (p. 87a, par. (h)).

(2) The underassessment of non-railroad property throughout the State resulted in an inflated "average tax

rate" which, when applied by statute to valuations of railroad property, constituted a denial of due process and of the equal protection of the laws under the Fourteenth Amendment (p. 87a, par. (i)).

(3) Assessments of debtor's property, being in excess of true value, constitute an interference with and a burden upon interstate commerce in violation of Article I, Section 8, of the Constitution (p. 89a, par. (l)).

(4) The assessments of debtor's property, being in excess of true value, constitute an interference with the exercise by Congress of its bankruptcy powers in violation of Article I, Section 8, Paragraph 4, of the Constitution (p. 89a, par. (m)).

The foregoing objections were first set forth in the original objections to the State's proof of claim. They are incorporated by reference in the "Supplemental and Amended Objections and Defenses, etc." of the trustees as alternative to the defense based upon the Settlement Acts (p. 95a, par. 5).

(5) The Settlement Act contract was a valid one under the law of New Jersey prior to the decision in *Wilentz* v. *Hendrickson,* and the latter ruling, if held applicable to the debtor's estate, would constitute an invalid impairment by judicial decision of a contract valid when made (p. 69a, par. 29). This is apparently an invocation of the rule in *Ohio Life Ins. & Trust Co.* v. *Bedolt,* 16 How. (U. S.) 416, 432, construing the obligation of contract clause of the United States Constitution, Article I, Section 10.

(6) The assertion by the State of New Jersey of a lien for that part of the tax claim consisting of interest

would result in the impairment of contract rights of the bondholders and deprive them of their property without due process of law, contrary to the Fourteenth Amendment, for the asserted reason that the law of New Jersey made no provision for a lien in respect of statutory interest on delinquent taxes at the time of the execution and delivery of the debtor's general mortgage (pp. 586a, 587a, par. 3).

It is true that by virtue of the decision of this Court in *Gardner* v. *State of New Jersey, supra,* the trustee is precluded from seeking a revaluation of debtor's properties, as a matter of bankruptcy power to determine the question of value. For that reason the constitutional objections listed in paragraph 4 are eliminated from this proceeding. This may also be true of the objections in paragraphs 1 and 3, though possibly not, since the valuations are questioned not merely as violations of state law, but as infringements of federal constitutional rights. Cf. *Hillsborough* v. *Cromwell,* 326 U. S. 620. But the objections noted in paragraphs 2, 5 and 6, *supra,* are clearly subsisting before the reorganization court and in no way affected by the case of *Arkansas Corporation Commission* v. *Thompson,* 313 U. S. 132.*

None of these federal constitutional questions would require determination in the event that the New Jersey courts, on the requested reference, determine that the Settlement Acts are valid as to the trustee or that a binding contract has arisen settling the amount of the tax claim against the debtor.

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* This is not to be taken as a concession of the validity of those objections as we are confident that they will be found untenable as a matter of law on the basis of other authorities, when and if their adjudication is called for by the reorganization court.

Both the majority and minority opinions in the Circuit Court of Appeals concluded that the doctrine of the *Spector Motor Service, Inc.* case, *supra,* was inapplicable here for the reason that in that case the state statute involved had not been previously construed (Tr., pp. 33, 45). We respectfully dissent from that asserted distinction. The determinative feature of the *Spector Motor Service, Inc.* and other cases cited hereinabove under that line of decision is that a federal court will not undertake determinations of federal constitutional law based upon its own preliminary conclusions with respect to uncertain matters of state law, but will refer the latter to the state courts so that the necessity for the decision of the federal constitutional questions will be made certain by an authoritative and binding state court decision of the state law questions. Under the rationale of that rule it does not make any difference whether the state law question is the meaning of a statute as yet unconstrued, or the determination of any other question of state law. The federal courts are just as apt to make an incorrect forecast of the ultimate decision of the highest state court upon a matter of state law in respect to which there are existing decisions in a state of conflict, or of uncertain application to a new situation, as when dealing with an ambiguous statute not yet construed. If, as has been conceded by the Attorney General for purposes of the application to the Bankruptcy Court denied by it, there is any debatable issue as to whether Article I, Paragraph 20, or Article IV, Section 7, Paragraph 11, of the New Jersey Constitution invalidate the Tax Settlement Acts as to the railroad debtor, the Bankruptcy Court is faced with the problem of making such a determination as a condition precedent for its entry into the federal constitutional inquiries

posed by the alternative objections to the state's tax claim noted above. Moreover, and in this respect the situation is within the precise holding, as well as the *ratio decidendi* of the *Spector Motor Service, Inc.*, case, in making a determination with respect to the constitutionality of the Tax Settlement Acts as special legislation under Article IV, Section 7, Paragraph 11, of the New Jersey Constitution, the Bankruptcy Court would be considering an issue which has never been decided by any New Jersey Court. (See *supra*, p. 6.)

The language of this Court in the *Spector* case is so perfectly dispositive of the issue here involved, that we quote its reasoning at length (323 U. S. at pp. 104, 105):

> "* * * it is for Connecticut to decide from what aspect of interstate business she seeks an exaction. It is for her to say what is the subject matter which she sought to tax and what is the calculus of the tax she seeks. *Every one of these questions must be answered before we reach the constitutional issues which divided the court below.*
>
> "Answers to all these questions must precede consideration of the Commerce Clause. To none have we an authoritative answer. Nor can we give one. *Only the Supreme Court of Errors of Connecticut can give such an answer.* But this tax has not yet been considered or construed by the Connecticut courts. We have no authoritative pronouncements to guide us as to its nature and application. That the answers are not obvious is evidenced by the different conclusions as to the scope of the statute reached by the two lower courts. The Connecticut Supreme Court may disagree with the District Court and agree with the Circuit Court of Appeals as to the applicability of the statute. But this is an assumption and at best 'a forecast rather than a de-

termination.' *Railroad Commission* v. *Pullman Co.*, 312 U. S. 496, 499, 85 L. Ed. 971, 974, 61 S. Ct. 643. *Equally are we without power to pass definitely on the other claims urged under Articles 1 and 2 of the Connecticut Constitution.* If any should prevail, our constitutional issues would either fall or, in any event, may be formulated in an authoritative way very different from any speculative construction of how the Connecticut courts would view this law and its application. *Watson* v. *Buck*, 313 U. S. 387, 401, 402, 85 L. Ed. 1416, 1423, 1424, 61 S. Ct. 962, 136 A. L. R. 1426.

"If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality—here the distribution of the taxing power as between the State and the Nation—unless such adjudication is unavoidable. And so, as questions of federal constitutional power have become more and more intertwined with preliminary doubts about local law, *we have insisted that federal courts do not decide questions of constitutionality on the basis of preliminary guesses regarding local law.* *Railroad Commission* v. *Pullman Co.*, 312 U. S. 496, 85 L. Ed. 971, 61 S. Ct. 643, *supra; Chicago* v. *Fieldcrest Dairies*, 316 U. S. 168, 86 L. Ed. 1355, 62 S. Ct. 986; *Re Central R. Co.*, (C. C. A. 3d) 136 F. (2d) 633, 54 Am. Bankr. Rep. (N. S.) 101. See also *Burford* v. *Sun Oil Co.*, 319 U. S. 315, 87 L. Ed. 1424, 63 S. Ct. 1098; *Meredith* v. *Winter Haven*, 320 U. S. 228, 235, 88 L. Ed. 9, 13, 64 S. Ct. 7; *Green* v. *Phillips Petroleum Co.*, (C. C. A. 8th) 119 F. (2d) 466; *Findley* v. *Odland*, (C. C. A. 6th) 127 F. (2d) 948; *United States* v. *150.29 Acres of Land More or Less*, (C. C. A. 7th) 135 F. (2d) 878. Avoidance of such guesswork, by holding the litigation in the federal courts until definite determinations on local law are made by the

state courts, merely heeds this time-honored canon of constitutional adjudication.

"We think this procedure should be followed in this case." (Italics supplied.)

In accord: *American Federation of Labor* v. *Watson, supra,* (327 U. S. at pp. 595-599); *Chicago* v. *Fieldcrest Dairies, supra,* (316 U. S. at p. 173); *Railroad Commission of Texas* v. *Pullman Co., supra,* (312 U. S. at pp. 499, 500, 501); cf. *Alabama State Federation of Labor* v. *McAdory, supra,* (325 U. S. at pp. 470, 471).

The magnitude and importance to all of the parties concerned of an expeditious determination, both of the reorganization as a whole and of the tax claim issue, makes it peculiarly important that the rule of the foregoing cases be followed in this case. Retention of the state law and state constitutional questions in the bankruptcy court promises possibilities of the greatest confusion and delay in the ultimate determination of the tax question because of the possibility of conflicting conclusions as to those matters by the district court, the Circuit Court of Appeals, and this Court, with the consequent wastage of considerable time, effort and money in the possible hearing and determination of unnecessary issues of both federal constitutional and federal bankruptcy law consequent upon erroneous determinations below of the state law and state constitutional questions.

There is one, and only one way of assuring that no needless inquiry into the alternative federal constitutional and federal bankruptcy issues will be undertaken in the bankruptcy court, and that is by procuring initially an authoritative and dispositive decision of the state law questions by the state courts, as will occur if the judgment of the Circuit Court of Appeals is not disturbed.

2. As to the preservation of "the appropriate relationship between federal and state authorities functioning as a harmonious whole."

If Order No. 260 had not been reversed by the Circuit Court of Appeals there would have been invited the possibility of a most unseemly collision and impasse between state and federal jurisdictions in a matter involving not merely the appropriate forum for the determination of a question of state law, but the settlement of a claim asserted by a sovereign state itself.

That such an impasse would arise is apparent from the following circumstances: The Settlement Acts require the payment of the full amount of principal tax arrearages for the years 1932-1940, together with interest at 3% per annum on all balances from and after December 1, 1940. P. L. 1942, Chap. 241, Sec. 4. Upon the basis of the most recent State claim in these proceedings, the total amount of principal and interest (3% per annum) which would be due from the debtor to the state *under the Settlement Acts* is $17,527,268.82.* Against this obligation, the debtor

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* This total is arrived at as follows:

Principal claimed from 1932-1939 (p. 107a, par. 9)	$14,140,887.53
Due from subsidiaries for same period (pp. 119a, 121a, 123a, 124a)	355,007.41
Unpaid principal for 1940 (p. 94a)	1,321,285.27
3% interest on balances from December 1, 1940 (see Exhibit "A" of "Petition of Trustee for order for instructions regarding the payment of taxes to the State of New Jersey", dated April 15, 1946, at page 296 of Tr. of R. in *Gardner* v. *State of New Jersey, supra)*	1,710,088.61
Total	$17,527,268.82

The difference between the $14,140,887.53 principal balance claimed by the State for 1932-1939, and the $12,117,383.92 (p. 94a, par. 2) computed by the debtor to be due for the years 1932-1939, is based upon the State's contention that previous partial payments on account by the debtor were legally appropriable to interest in advance of principal. Cf. *State* v. *Erie Railroad Co.*, 23 N. J. Misc. 203, 42 Atl. (2d) 759.

paid the State on May 6, 1946, pursuant to Order No. 333 in the reorganization proceedings, only $15,250,000 (Tr. of R., p. 318, in *Gardner* v. *State of New Jersey, supra*).

It thus appears that if the reorganization court undertakes to, and does, adjudicate that the Settlement Acts bind the State and that the obligation of the debtor to the State is computable upon that basis, and should the court further determine the local law question pertaining to the proper rule of appropriation of prior partial payments on account in favor of the position taken by the State, *an additional substantial balance will have to be ordered paid by the bankruptcy court to the State.* This is so, whether the rule of computation is determined to be the "United States" rule, on the basis of which the State's amended proof of claim has been computed, or the modified "United States" rule held to be applicable in *State* v. *Erie Railroad Co.*, 23 N. J. Misc. 203, 42 Atl. (2d) 759. *The tender of that balance would certainly be refused by the State Treasurer of New Jersey, since such tender would unquestionably and unequivocally be made pursuant to the Settlement Acts,* whereas *the final injunction* entered in *Wilentz* v. *Hendrickson, supra, permanently enjoins the State Treasurer from accepting any tenders of money under and pursuant to the Settlement Acts.* Not only under the Settlement Acts, but under the laws governing the duties and obligations of the State Treasurer generally, R. S. 52:18-1; *et seq.*, he is the only officer who can accept and transmit moneys into the State Treasury. He is, moreover, a constitutional officer (N. J. Const., Art. VII, Sec. 2, para. 2).

Notwithstanding such a decision by the federal courts the position of the officials of the State of New Jersey

might continue to be that the Settlement Acts were a nullity, since the final decree in *Wilentz* v. *Hendrickson* by the highest court of the State expressly held them so to be, not merely as against any particular railroad taxpayer, but absolutely and in entirety (p. 92a).

The sad spectacle of the conflict between federal and state authority which would result from such a determination by the reorganization court cannot be justified on the basis of any theoretical discussion by the trustee as to the supposed conclusiveness against the State of such a federal adjudication. Apart from the serious legal doubts attending such a conclusion, there would remain in any event a most regrettable disruption of the "appropriate relationship between federal and state authorities functioning as a harmonious whole." (*Chicago* v. *Fieldcrest Dairies, supra,* 316 U. S. at p. 173.)

But, as was stated by the United States Supreme Court in *Railroad Commission* v. *Pullman Co., Inc., supra,* (312 U. S. 496, at pp. 500-501), and reiterated in *Chicago* v. *Fieldcrest Dairies, supra,* (316 U. S. 168, at pp. 172, 173), " 'the resources of equity are equal to an adjustment that will avoid the waste of a tentative decision' and any 'needless friction with state policies.' " The indicated "adjustment" here is obviously by way of acceding to the request of the Attorney General and referring the state law and state constitutional questions to the state courts. Should they agree with the trustee that the Settlement Acts are valid as to the trustee and the debtor's estate, they could, and unquestionably would, modify the restraint against the State Treasurer which was entered in *Wilentz* v. *Hendrickson, supra,* so as to per-

mit the acceptance by that officer of any sum or sums adjudicated to be due from the estate of the debtor to the State in compliance with the Settlement Acts. Only in that way can this most vital issue raised in these proceedings be determined with authoritative finality and avoidance of needless friction between federal and state authorities and in consonance with the "appropriate relationship between federal and state authorities functioning as a harmonious whole."

> "Considerations of delay, inconvenience, and cost to the parties which have been urged upon us, do not call for a different result. For we are here concerned with *the much larger issue as to the appropriate relationship between federal and state authorities functioning as a harmonious whole.*" (*Chicago* v. *Fieldcrest Dairies, Inc.*, 316 U. S. at p. 173.)

That we are here confronted with a railroad reorganization under Section 77 does not affect the basic principle. The same disposition of a similar problem was made by the court in a Section 77 railroad reorganization case, *Thompson* v. *Magnolia Petroleum Co.*, 309 U. S. 478. And see the application of this principle in many general bankruptcy cases. *Ex parte Baldwin*, 291 U. S. 610, 619, cited by this Court in *Gardner* v. *State of New Jersey, supra,* (329 U. S. at p. 584), and the many cases cited in *Ex parte Baldwin, supra* (footnote on p. 619). The application of the rule is peculiarly apposite where the fiscal policies of the affairs of a state are involved. See the reference to "our historic national policy of federal non-interference with the taxing power of states," in *Arkansas Corporation Commission* v. *Thompson*, 313 U. S. 132, 145. Cf. the emphasis upon abstention of exercise of federal equity jurisdiction where

the "collection of state taxes or the fiscal affairs of the state" are involved. *Meredith* v. *Winter Haven,* 320 U. S. 228; *Matthews* v. *Rodgers,* 284 U. S. 525; *Great Lakes Dredge & Dock Co.* v. *Huffman,* 319 U. S. 293; *Stratton* v. *St. Louis S. W. R. Co.,* 284 U. S. 521.

II.

Response to statement by petitioner of the questions presented.

Petitioner formulates six "Questions Presented" at page 11 of his petition.

Questions 1 and 2 assume that the judgment of the Circuit Court of Appeals results in an abdication to the state courts by the bankruptcy court of its power to approve compromises of controversies arising in the administration of the estate of the debtor. This is plainly a misconception. The Attorney General in no way has questioned the right and authority of the bankruptcy court given by Section 27 of the Bankruptcy Act to approve the compromise of any controversy made by the trustee. The question which the Circuit Court has directed to be referred to the state courts merely submits for determination by the state courts the question as to whether the necessary second party to the compromise, the State of New Jersey, or its officers, possessed constitutional capacity to propose or consummate the compromise contained in the Settlement Acts, or whether any contract effectuating the compromise arose, under New Jersey law, notwithstanding unconstitutionality of the acts. The only function of the bankruptcy court

under Section 27 of the Bankruptcy Act is to approve the election of the trustee to become one of the parties to a proposed compromise. No question at all is raised by anyone as to the complete propriety under Section 27 of the action of the bankruptcy court and of the trustee in electing to become one of the parties to the proposed bilateral compromise agreement. What *is* involved is the issue as to whether the proposal of the legislature to make the State of New Jersey the other party thereto was offensive to the New Jersey Constitution, an issue which is one purely of state law in the highest degree and properly referable to state tribunals for adjudication for the reasons set forth above.

The third question framed by the petitioner is whether it is proper for the Circuit Court of Appeals to direct a bankruptcy trustee to submit one objection to the tax claim of a state to a state court and retain in the bankruptcy court "for later trial and decision other objections to the claim with inevitable, interminable and unnecessary delay in the reorganization of the debtor." This is a misstatement of the effect of the decision of the Circuit Court, since the reference of that "one" objection to the state court, that based upon the applicability of the Settlement Acts, may obviate the later trial and decision of all of the other objections to the claim, thus saving, rather than causing, "inevitable, interminable and unnecessary delay."

The purport of the fourth question presented is not at all clear. If the intent is to question the status, as matters of law, rather than of fact, of the issues referred to the state court involving the Settlement Acts, the best refutation is the express recognition by this Court in the *Gardner*

case, *supra*, that those questions are questions of local law (329 U. S. at p. 583).

The repetition of the same assertion in the fifth question, that the issue referred to the state court "was a mere issue of fact", plainly misapprehends what is involved in the directed reference. Three broad questions will require determination by the state court under the reference: (1) whether the Settlement Acts offend Article I, Paragraph 20, of the State Constitution in their application to the debtor; (2) whether the Settlement Acts offend Article IV, Section 7, Paragraph 11, of the New Jersey Constitution (prohibition of special legislation; see p. 6, *supra*); (3) whether, assuming the unconstitutionality of the Settlement Acts, the attempted compliance therewith by the debtor gave it vested rights under those acts under the authority of such New Jersey cases as *Lang* v. *Bayonne*, *supra*, notwithstanding the contrary rule laid down in *Hyman* v. *Long Branch Kennel Club*, *supra*, and the circumstances indicating absence of any completed accord because of the refusal of, and injunction against, the New Jersey officials required to act in acceptance of the tenders made pursuant to the Settlement Acts, so to do.

All of these questions are essentially questions of law and not of fact.

Even the assertion that the reference of the question as to constitutionality under Article I, Paragraph 20, involves only "a factual" issue as to the adequacy of certain considerations, is ill founded. As to this, the position of the Attorney General in *Wilentz* v. *Hendrickson*, *supra*, was primarily, that, viewed realistically, and stripped of forms and pretenses, the settlement legislation was, and was in-

tended by the legislature to be, a financial subsidy to the railroads of the state, and particularly to those in financial distress, on the theory that such financial assistance was necessary to foster railroad transportation and to rescue railroads from actual or threatened bankruptcy; that legislation of that character was precisely of the essence of the kind of legislation which it was the principal purpose of Article I, Paragraph 20, of the New Jersey Constitution, adopted as an amendment thereto in 1875, forever to prohibit. The Court of Chancery of New Jersey agreed precisely with this position, *Wilentz* v. *Hendrickson,* 133 N. J. Eq. at pages 474, 479-481, 484; 33 Atl. (2d) at pages 383, 386, 387, 388; and the Court of Errors and Appeals affirmed the decree in Chancery on the grounds stated in the Chancery opinion, as well as for other reasons contained in the opinion of that court.

As to the asserted "considerations" which were advanced on behalf of the State Treasurer to support the view that the legislative transaction was not donative, but contractual in character, the position of the Attorney General was that the legislative language, viewed against the background of the circumstances preceding and attending the adoption of the legislation, of which the court might take judicial notice, plainly showed that the asserted considerations were not intended by the legislature as bargain equivalents for the legislative grant, and that if they were, they were so slight, compared with the magnitude of the legislative remission, that the transaction as an entirety continued to retain the fundamental characteristics of a donation, rather than a contract. Again, we find presented an unadulterated issue of law. See *Wilentz* v. *Hen-*

drickson, 133 N. J. Eq. at pages 481-483, 33 Atl. (2d) at pages 387, 388; 135 N. J. Eq. at pages 257-260, 38 Atl. (2d) 207, 208.

Finally, the Attorney General contended that the unquestionably illegal "consideration" for the transaction (financial assistance for the purpose of promoting railroad transportation by privately operated companies) had the legal effect of vitiating the entire transaction, assuming any otherwise independently sufficient consideration. This contention was specifically concurred in by the Court of Chancery in *Wilentz* v. *Hendrickson,* 133 N. J. Eq. 447, 484, 33 Atl. (2d) page 388 [42] and, not having been disapproved by the Court of Errors and Appeals, was incorporated by reference in the opinion of that court. *Wilentz* v. *Hendrickson,* 135 N. J. Eq. 244, 261, 38 Atl. (2d) page 208 (last paragraph of majority opinion).

We submit that decision of the issues thus posed, which will again be squarely put forth in the present controversy whether the issues are decided by the courts of New Jersey or in the bankruptcy court, necessarily and inescapably involve the determination of strictly legal issues of construction of New Jersey legislation and of the New Jersey Constitution.

The sixth question framed by the petitioner is as follows:

> "6. Did not the Circuit Court err in holding that the Bankruptcy Court could not decide whether there had been a valid compromise of the State's claim on the ground that its decision could not be enforced without contravening a decree in the State Court against the State Treasurer?"

As to this, we submit that the Circuit Court did not hold that the bankruptcy court "could not" decide, but that it *ought not* to make such a decision in view of the continued pendency of the final injunction in the New Jersey courts. In any event, it is quite immaterial whether or not the Circuit Court of Appeals conceived that the bankruptcy court could not, as a matter of jurisdiction, decide the question involved. All that matters is *whether the judgment* of the Circuit Court of Appeals directing that the district court grant the application of the Attorney General for the state court reference, *violates or is in accord with the controlling rule* in a situation such as that here presented. We believe we have demonstrated under Point I hereinabove, that the judgment of the Circuit Court was not only not contrary to, but was affirmatively required by the rules in comparable situations laid down in recent years by this Court.

Nor should the issuance of a writ in this matter be controlled by differences of opinion as to whether the question below was one of discretion or one of law. If the problem in the bankruptcy court was one of discretion, it was a discretion subject to application in accordance with well settled rules, departure from which was appropriately subject to correction on review by the Circuit Court of Appeals. As was stated in *Franklin Life Insurance Co.* v. *Johnson,* 157 Fed. (2d) 653, 656 (C. C. A. 10th, 1946), "it is a judicial discretion, subject to review, and must be exercised in accordance with legal principles." A legal abuse of discretion consists of an "unreasonable departure from considered precedents, and settled judicial custom, which is error of law". *In re Horowitz,* 250 Fed. 106, 107 (C. C. A. 2d, 1918).

Thus, any debate in the present situation as to whether the district court erred in a matter of discretion or in a matter of law reduces itself to a mere play on words. The real issue is whether authoritative precedents of this Court required that the bankruptcy court grant the Attorney General's application. We submit they did, and that the judgment of the Circuit Court of Appeals is proper. Denial of certiorari by this Court will not import any determination contrary to the decision of the court in the *Gardner* case, *supra,* that the bankruptcy court had jurisdiction to pass upon the issues here involved. It will merely signify that there is no basis presented for reviewing an action by the Circuit Court, the possibility of which was plainly contemplated by this Court in the *Gardner* case, *supra,* (329 U. S. at p. 584).

III.

Response to reasons asserted by petitioner as to why writ should issue.

***"First:* The Circuit Court has so far departed from the accepted and usual course of judicial procedure as to call for an exercise of this Court's power of supervision."**

The first contention of petitioner under this heading is that the action of the Circuit Court is at variance with what was decided by this Court in *Gardner* v. *New Jersey, supra,* relying upon the statement in the latter opinion (329 U. S. at p. 584), that "the reorganization court could properly entertain all objections to the claim * * *." In view of the issue presented in the *Gardner* case, *i. e.,* whether the bankruptcy court had jurisdiction in a technical sense to deal

with the various questions raised, and of its decision in the affirmative on that issue, it is obvious that the language quoted by petitioner was merely intended as a paraphrase of that conclusion. It was not intended to negative the proposition that the situation was one in which, notwithstanding the existence of jurisdiction in the technical sense, the state law issues relating to the existence of a settlement contract were appropriately referable to the state courts. Moreover, the reference in the opinion of this Court in that case (329 U. S. at p. 583, 584) to the pendency of the appeal which resulted in the judgment of the Circuit Court of Appeals here sought to be reviewed, demonstrates that the very result now attained was within the distinct contemplation of this Court as a possibility in nowise departing "from the accepted and usual course of judicial procedure."

Petitioner's argument under "B" on page 17 proceeds upon the mistaken hypothesis that the Circuit Court of Appeals was deciding an issue of jurisdiction. Actually, the Court was merely determining which of two forums was the right one for the determination of certain questions of state law. (This is what the Court was actually deciding, whether or not one agrees with its characterization of the issue before it as one of law, rather than of judicial discretion.) In the language from its opinion criticized by petitioner, the Court was merely posing alternative possibilities with respect to the outcome of the meritorious issues, one of which would leave and the other eliminate any policy of conflict with the outstanding Chancery Court injunction. The Court was merely pointing out that if it could be concluded that the federal court could only arrive at that decision of the meritorious questions which would accord with the result in the State Chancery suit,

there would be no occasion for making the reference to the state courts, since no collision between federal and state determinations could arise. There would be neither "friction with state policies," nor disruption of the "appropriate relationship between federal and state authorities functioning as a harmonious whole." *Chicago* v. *Fieldcrest Dairies, supra* (316 U. S. at p. 173). The Court was not making a determination that the existence of "jurisdiction", in the technical sense, could be made to depend upon the prospective outcome of the meritorious issues.

***"Second:* The Circuit Court has decided an important question of Federal law which has not been, but should be settled by this Court."**

In substance, petitioner asserts that the decision of the Circuit Court in some unspecified way conflicts with the provisions granting the bankruptcy court various powers in respect of a bankrupt estate, particularly the power of the court under Section 27 of the Bankruptcy Act to approve a compromise effected by the trustee. We have shown hereinabove on page 18 that the Circuit Court decision neither purported nor was calculated to delegate to the state courts the function of making or approving a compromise between the State and the debtor and trustee, nor did the judgment below impair any other statutory power or right of the bankruptcy court. It only determined that the circumstances were such as to make it appropriate that the aid of the state court with respect to matters of state law be sought by the bankruptcy court to make possible its administration of the estate in reorganization, without any unnecessary and unseemly clash between federal and state jurisdictions.

***"Third:* The Circuit Court of Appeals has decided a Federal question in a way probably in conflict with applicable decisions of this Court."**

Again petitioner asserts that the action of the Circuit Court of Appeals is in conflict with the *Gardner* case and other applicable decisions of this Court. That there is no conflict with the *Gardner* case we think is adequately demonstrated by what we have said hereinabove at pages 24 and 25.

There is no conflict with the decision in *Public Utility Commission of Ohio* v. *Gas Co.*, 315 U. S. 456, since a determination by the state courts that a binding contract does exist between the State and the trustee settling the amount and lien of the state would completely determine the entire tax controversy and eliminate in its entirety all of the federal and constitutional statutory questions involved in the alternative objections of the trustee and the bondholders to the claims asserted on behalf of the State. None of the other decisions of this Court cited by petitioner in any way support the contention that the Circuit Court of Appeals has decided a federal question in a way probably in conflict with applicable decisions of this Court.

Conclusion.

This case involves no matter properly warranting the exercise of the discretionary review of certiorari by this Court and it is respectfully submitted that the prayer for the issuance of a writ of certiorari should be denied.

Respectfully submitted,

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